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IN THE

Supreme Court of the United States

October Term 1968

No. [redacted] 141

CARL I. COHEN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AARON E. KOOTA
District Attorney, Kings County
Attorney for Respondents
Municipal Building
Brooklyn, New York 11201

WILLIAM I. SIEGEL
Assistant District Attorney
of Counsel

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—OREGON 5-4540

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Statement

Petitioner seeks a writ of certiorari to review an order of the Court of Appeals of the State of New York made April 18, 1968 (not as yet officially reported), which adjudged that an original decision of that Court, rendered July 7, 1966, be adhered to. The order followed the granting of petitioner's motion for reargument of the order of July 7, 1966 which had affirmed an order of the Appellate Division of the Supreme Court dated November 29, 1965 (24 AD 2d 900). The Appellate Division had modified, and as modified, affirmed, an order made by Honorable Dominic S. Rinaldi, a Justice of the Supreme Court, Kings County (42 Misc. 2d 403) dated March 13, 1964.*

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* The petition includes as appendices these various orders; and the Court is respectfully referred thereto.

Previous Proceedings

Petitioner at all times herein concerned rested under five indictments found by the Grand Jury of Kings County in 1960 charging him with the commission of the crime of Abortion. In the course of judicial proceedings respecting these indictments he learned that on or about July 28, 1960 an order had been made by Honorable J. Vincent Keogh, then a Justice of the Supreme Court, pursuant to the provisions of the Code of Criminal Procedure, Section 813-a, which authorized the interception of telephone communications being transferred over a telephone located in petitioner's office in Brooklyn and registered on the records of the New York Telephone Company in his name.

He moved in the Supreme Court for two-fold relief. One form was for an order granting a hearing to determine whether or not the telephone interception order of July 28, 1960 had been issued after due compliance with the requirements of Code Crim. Pro. Section 813-a. The other type was for the vacatur of the authorizing order itself.

After argument before Honorable George A. Arkwright, a Justice of the Supreme Court, Kings County, the motion was denied by an order of February 26, 1963.

Petitioner appealed from the order, but on April 17, 1963 the Appellate Division of the Supreme Court, Second Judicial Department, unanimously granted the People's motion to dismiss the appeal. No opinion was written.

Petitioner then took action of two-fold nature. Upon the assumption that the order was made in a criminal action and that an appeal therefrom lay only by permission granted by a Judge of the Court of Appeals or a Justice of

the Appellate Division pursuant to Code Crim. Pro. Section 520, an application was made to Judge Fuld of the Court of Appeals for such leave to appeal. It was denied by him on July 10, 1963. Petitioner had simultaneously moved in the Court of Appeals for leave to appeal from the Appellate Division order of April 17, 1963. That Court denied leave to appeal on the same day, July 10, 1963. Neither Judge Fuld nor the Court of Appeals wrote an opinion.

Petitioner then petitioned this Court for a writ of certiorari to review the order made by Arkwright, J., but the Court on January 13, 1964 denied and dismissed the petition (375 U.S. 985).

After the denial by Fuld, J. and by the Court of Appeals of leave to appeal to that Court, but before the final action of this Court in denying the petition for certiorari, hearings which had begun on a motion in the former Kings County Court were resumed in the Supreme Court for relief identical with that denied by Arkwright, J. This motion was claimed to be necessitated by the reorganization of the New York Courts pursuant to which the former County Court was merged with and became part of the Supreme Court and former County Judge Rinaldi became a Justice of the Supreme Court. The long and voluminous hearings resulted in the order made by Rinaldi, J. which we here summarize for the convenience of this Court.

The order vacated the July 28, 1960 telephone interception order made by Keogh, J., restrained and precluded the District Attorney of Kings County and the Police Department from using upon petitioner's trial all telephone conversations obtained as a result of the wiretaps and all leads,

clues and information directly or indirectly obtained as a result thereof; restrained and precluded the District Attorney from calling as witnesses upon petitioner's trial the female persons named in the indictments against him as the abortees; restrained and precluded the District Attorney and the police from using upon the trial all evidence seized by a search of petitioner's home and office; and directed the return of the property thus seized.

The People appealed from this order. As a preliminary necessitated by Section 518-a of the Code of Criminal Procedure the People asserted that the deprivation of the use as evidence of the property ordered to be returned or suppressed had rendered the sum of the proof available to the People with respect to the criminal charges filed against petitioner either (1) insufficient as a matter of law, or (2) so weak in its entirety that any reasonable possibility of prosecuting such charges to a conviction had been effectively destroyed.

The Appellate Division modified the order by reversing that portion thereof which had held the original wiretap order invalid and also by reversing that portion which had precluded the People from using upon petitioner's trial the testimony of the prosecutrices; and as thus modified, affirmed.

Pursuant to permission granted by Fuld, J. on January 25, 1966 petitioner appealed to the New York Court of Appeals from the Appellate Division order. The Court of Appeals affirmed by the order of July 7, 1966 previously referred to.

Thereafter the Court of Appeals, by an order made December 29th, 1967, granted petitioner's motion for reargu-

ment. Briefs were submitted and oral reargument was had before the Court with the result that in the aforementioned order of April 18, 1968 the original decision of the Court of Appeals was adhered to.

It is, however, of the utmost pertinence to the present petition for certiorari to note that after the Court of Appeals affirmance of July 7, 1966 (18 N.Y. 2d 650), petitioner addressed to this Court a petition for the writ of certiorari. It was denied December 5th, 1966 "for want of a final judgment" (17 L. Ed. 2d 438 reh. den. January 16th, 1967; 17 L. Ed 2d 680).

The present petition for the issuance of the writ of certiorari by this Court follows.

Jurisdiction

Jurisdiction for the petition is sought to be invoked under 28 U.S.C. Section 1257 (3). Petitioner contends that his rights, privileges and immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self-incrimination), and the Fourteenth Amendment (due process of law) of the Federal Constitution, and under 47 U.S.C. Section 605, were violated.

We answer that the same considerations which caused this Court to deny appellant's two earlier petitions for certiorari (and particularly the consideration that there is in this case no final judgment) are as pertinent to petitioner's present situation as they have always been. It is therefore our respectful and confident submission that the instant petition should be similarly denied.

POINT I

Clarification of the issues presented by the petitioner.

The present petition is in all but one of its arguments* a restatement in substance, and indeed in great part in language, of the contentions already twice rejected by this Court. Thus: of the forty-eight page opus (of which the first eighteen pages are a recitation of historical facts) fully one-third of the petition (pp. 36-47) is an argumentative reference to alleged improper police conduct in losing a desk diary calendar belonging to petitioner, in not preparing and retaining full reports of police activities and in coercing from one of the prosecutrices (Esther Richards) statements pertaining to an abortion which petitioner committed upon her, and in ultimately arresting her.

We repeat here what we wrote in our brief (dated November 1966) in answer to appellant's second petition for certiorari:

> "It is our submission that none of these alleged facts creates a Federal question for the scrutiny of this Court and therefore we enter into no combative analysis of the evidence which would disprove and destroy these claims of impropriety."

Petitioner again attacks the sufficiency of the wiretap affidavits concerned in the case and lists in detail their alleged infirmities (Petition, pp. 23-30). The petition affects a lack

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* The exception consists of appellant's reliance upon *Berger* v. *New York*, 388 US 41 and *Katz* v. *United States*, 19 L ed 2d 576, which this Court decided after the December 5th, 1966 dismissal of the petition because of want of a final judgment. We discuss the relation of these cases to the present petition on p. 7 *et seq.* of this brief.

of understanding of the decisions of the Appellate Division and the Court of Appeals which sustained their legal and constitutional sufficiency. We suggest a very simple reason for the decisions of these respected Courts: that the affidavits were in fact and in law sufficient, when judged by the most stringent constitutional standards, to sustain the legality of the wiretap order.

Petitioner assesses the opinion of the Court of Appeals in *People* v. *Kaiser*, 21 NY 2d 86, and that Court's decision in his own case, as a holding by the Court that this Court's decisions in Berger v. New York, supra, and Katz v. United States, supra, are not to be accorded retroactively. In this assessment he is eminently correct. In *Kaiser*, Keating, J. wrote for a majority of six, Fuld, C.J. alone dissenting:

> "Applying these standards in the case at bar, we are led to the conclusion that the Berger decision should be given only prospective effect. The purpose of the exclusionary rule, to which Berger made eavesdropping evidence subject, is deterrence of future police conduct. Applying Berger retroactively will not, therefore, undo the violation of the defendant's rights which may have already taken place. The admission of the wiretap evidence has no effect on the 'integrity of the fact-finding process' (Linkletter v. Walker, supra). Indeed, the probative value of the evidence is beyond question. In addition, thousands of eavesdropping orders have been issued in reliance upon the statute and the decisions of this court which the Supreme Court had seen fit not to disturb. (See People v. Dinan, 11 NY 2d 350, cert. den. 371 US 877; People v. Pugach, 16 NY 2d 504, app. dsmd. 383 US 575; People v. Cohen, 18 NY 2d 650, cert. den. 385 US 976, rehearing den. 385 US 1032).* Moreover,

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* The *Cohen* case mentioned by Keating, J., is petitioner's matter.

> even under prior law no eavesdropping order could be sustained without "procedure of antecedent justification before a magistrate', which is central to the Fourth Amendment. *Under these circumstances we hold that Berger should be held applicable only to those cases in which the orders were issued or the eavesdropping took place after the date of that decision.*" (Italics ours.)

Petitioner argues that nevertheless he is presently entitled by way of the writ of certiorari to a review of his case—which would be a review of *Kaiser*—because to relegate him to a review only after his conviction shall have occurred would create "a situation of altogether possible future severe injustice" to him (Petition, p. 8).

He realizes the hurdle which the argument faces in this Court's denials of the prior petitions for the writ of certiorari because of the want of a final judgment. He therefore attempts to demonstrate that in fact the prior proceedings in the State Courts have resulted in something which is analogous to a final judgment. It is, we believe, a fair summary of the argument thus to present it: The prosecution, by filing the statement required by Code Crim. Pro. Section 518-a, in effect admitted that the suppression of evidence directed by Mr. Justice Rinaldi would—if that direction remained in effect—destroy any reasonable possibility of prosecuting such charges to a conviction. This admission had the effect of making the suppression order "the equivalent of a final and not merely an interlocutory order" because "Justice Rinaldi's suppression order, under the operation of the law and practice of the State of New York in the manner above-mentioned, was the legal or jurisdictional equivalent of an order dismissing the indict-

ment or indictments involved" (Petitioner's present petition, p. 5).

It is our submission that this argument is one of desperation only, without any basis in fact or law. The phrase "final judgment" is the verbal expression of a legal status. That status (or perhaps better expressed, that stage in litigation) denotes a Court decree or judgment in which (in criminal cases) a defendant's guilt or innocence has been established. "Final" means in law exactly what it means in normal language: that the judgment is, at that point, the last result of all the prior proceedings in the litigation. Under no realistic construction of "final judgment" can it be said that the People were completely, and ultimately, and finally, and without recourse, barred from trying petitioner on the indictments. Reasonable possibility of prosecution may have disappeared—and this is all which Section 518a required the People to assert in order to be entitled to appeal from the order. *Non constat,* however, that the People might not procure from some other source evidence sufficient to constitute a workable basis for continued and completed prosecution.

The petition has yet another vital defect. It does not in *haec verba* pray for an injunction against prosecution; but, viewed realistically, this is the resultant relief which is actually sought.

While this Court has held that there exists Federal power to enjoin State prosecutions (*Ex Parte Young,* 209 U.S. 123, 52 L. ed. 714, 28 S. Ct. 441), it has nevertheless consistently "recognized that Federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our Federal framework. It

is generally to be assumed that State Courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." (*Dombrowski* v. *Pfister*, 380 U.S. 479, 14 L. ed. 2d 22, 85 S. Ct. 1116). Accord: *Douglas* v. *City of Jeannette*, 319 US. 157, 87 L. ed. 1323, 63 S. Ct. 877. As Mr. Justice Brennan wrote in *Dombrowski, supra* (foot-note 3):

"It is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment."

The foregoing discussion is not based upon a theoretical assumption, but upon the actual condition of the case in the State Supreme Court. On June 3, 1968, the case was called for trial in that Court. Defense counsel asked for a postponement. The District Attorney agreed to a postponement, but only until July 1, 1968. The District Attorney also stated that unless the trial were stayed by a Court empowered to do so, the People would be ready, and would press, for trial on the adjourned date. At the time of this writing, no notice has been served by petitioner's counsel on the District Attorney that a stay has been applied for to any Court or Judge.

We imply no criticism of petitioner, and we mean no disrespect for his counsel, when we say that the presentation to this Court of the present petition at this stage of the litigation is a repetition of identical maneuvers in

almost identical conditions in the past. We realize that appellant is entitled to exhaust every avenue of relief which he believes to be open to him and that his counsel not only have the right, but are under the duty, of forwarding his interests by the exercise of all their considerable skill. Nevertheless, it is, we submit, completely obvious that petitioner has presented on his present application no facts which should move this Court to depart from its prior holdings on previous petitions. The final judgment which was then wanting is still absent in the records of the case. Until a final judgment is had, petitioner shows no good reason why the invariable rule of this Court—not to restrain a State prosecution either directly or by inescapable effect—should not be followed and enforced.

POINT II

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York,
June 1968.

Respectfully submitted,

AARON E. KOOTA
District Attorney
Kings County

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel.